IN THE

Supreme Court of the United States

October Term, 1974.

No. 73-1908.

STEWART S. CORT, LEWIS W. FOY, EDWARD D. BICKFORD, BERNARD D. BROEKER, ALBERT M. REED, C. THOMPSON STOTT, IVOR D. SIMS, CROWDUS BAKER, JESS H. DAVIS, THOMAS S. GATES, ROBERT B. HOBBS and GEORGE P. JENKINS, All Being Directors of BETHLEHEM STEEL CORPORATION,

and

BETHLEHEM STEEL CORPORATION,

Petitioners,

v.

RICHARD A. ASH, on Behalf of Himself, and on Behalf of BETHLEHEM STEEL CORPORATION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENT.

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QUESTIONS PRESENTED.

1. Did the Court of Appeals err in holding that a private cause of action exists under 18 U. S. C. § 610 on behalf of a stockholder and registered voter against a corporation or its directors who are found to be in violation of that statute?

2. Did the Court of Appeals err in reversing entry of summary judgment against plaintiff given: (a) that plaintiff's Complaint raises unresolved factual issues as to the alleged violation of 18 U. S. C. § 610; and (b) that there was an additional theory of recovery cognizable in Federal Court independent of the implication of a private cause of action?

3. Should this Court hold that 18 U. S. C. § 610, enacted as part of Congress' constitutional power to regulate federal elections, is in violation of the First and Fifth Amendments to the Constitution of the United States, especially in view of the fact that the Court of Appeals specifically refused to decide these issues and recognized that the District Court never passed on these Constitutional issues?

COUNTER-STATEMENT OF THE CASE.

On July 12, 1973, the United States District Court for the Eastern District of Pennsylvania granted defendants' motion for summary judgment without opinion. The grant of summary judgment was tantamount to a dismissal of the case for failure to state a cause of action cognizable in federal court. At the time summary judgment was entered, the record consisted only of a Complaint [A8], a First Amended Complaint [A69], Answers thereto [A20], and a minimal stipulation of agreed upon facts prepared in connection with a preliminary injunction motion heard October 20, 1972 [A28]. Plaintiff had had no discovery and his factual allegations were virtually untested.

Plaintiff Richard A. Ash, a stockholder of Bethlehem Steel Corporation and a voter, alleges that the directors of Bethlehem Steel Corporation ("Bethlehem") entered into a course of conduct and plan to utilize the corporation's resources, including the expenditure of funds, for the purpose of insuring victory for the Republican Party in the 1972 Presidential election. See First Amended Complaint paragraphs 13-15 [A72-A73]. The Complaint and First Amended Complaint alleged violations of the Federal Election Campaign Act[1] 18 U. S. C. §610 for illegal contributions and expenditures by Bethlehem and asserted a cause of action under both state and federal law.

Defendants in the courts below and again in this Court focus only on plaintiff's allegations relating to an advertisement, a reprint of a speech and a folder paid for and

1. This Act was originally titled the Federal Corrupt Practices Act. The Act was amended in 1971 by the Federal Election Campaign Act. Hereinafter, the statute will be referred to either as the Federal Election Campaign Act or the "Act."

disseminated by Bethlehem. However, as the Complaint and First Amended Complaint make clear, plaintiff has alleged a widespread misuse of corporate resources, including funds. This misconstruction of plaintiff's Complaint is compounded by the fact that at the hearing on the preliminary injunction motion (the only motion that resulted in an opinion in the district court), the evidence introduced pertained solely to the advertisement, the speech and the folder.

Defendants' summary judgment motion was not accompanied by affidavits. The lower court disregarded the substantial disputed issues and decided the summary judgment motion solely on the ground that plaintiff lacked an implied private cause of action under Section 610. The case has in a sense been bifurcated in its progress through the lower courts. Because defendants admitted that the advertisement, the folder and the speech were prepared and disseminated at corporate expense, both the District Court and the Court of Appeals devoted discussion to these items. The remainder of the allegations, claiming other misuse of corporate resources, has remained in the background. The District Court, as early as October 30, 1972, in its order denying a preliminary injunction, ruled that the advertisement did not constitute an expenditure within the meaning of 18 U. S. C. §610, observing that in the court's opinion the advertisement was not directed to the election of a specific person or persons to federal office. The Court of Appeals in its decision reversing the lower court's grant of summary judgment held that a private cause of action lies for violation of Section 610 and that the partisan nature of the advertisement was a fact genuinely disputed and able to be determined only after trial [A107-108]. It noted in passing the existence of a state cause of action. *Ash v. Cort* , 496 F. 2d 416, 419 n. 1 (3d Cir. 1974).

THE ADVERTISEMENT, SPEECH AND FOLDER PREPARED AND DISSEMINATED BY BETHLEHEM.

1. The Advertisement.

The Advertisement [A31] was mailed to plaintiff and all stockholders of Bethlehem along with a quarterly dividend on September 11, 1972. During the late Summer and Fall of 1972, the advertisement appeared in various media of national and local circulation including nineteen local newspapers in towns in which Bethlehem has plants. The Advertisement calls for the mobilization of "truth squads to keep the campaign honest," and states in the words of defendant Stewart S. Cort, Chairman of the Board of Bethlehem:

> "Why do I see this need? Because several months ago we lived through a number of political primary campaigns. And it ought to be clear to all of us that there have been times when truthfulness took an awful beating. And now we have a presidential campaign ahead, during which we can clearly see a lot of the same.
>
> "I'm thinking of the careless rhetoric and accusations that are being thrown around these days—their main target being the business community.
>
> • • •
>
> "As an example of the careless rhetoric and accusations about the business community, Mr. Cort quoted the following statement made by a political candidate: 'The time has come for a tax system that says to big business—you must pay your fair share.'"

2. The Cort Speech

The Cort Speech [A32-A41] is entitled "Speak Out For Truth" and was given at the Rotary Club of Jacksonville, Florida on June 12, 1972 by Bethlehem's Chairman of the Board, Stewart S. Cort. Bethlehem printed this speech in its entirety, referred to it in the advertisement stating that it would send it to all persons making a request, and did in fact so send it. The speech contains numerous commentaries on the pending Presidential election:

(a) Truthfulness in campaigns, p. 1 [A33]:

> "The title of my talk consists of four words of advice: 'Speak Out For Truth.' Why do I see this need? Because we've recently lived through a number of political primary campaigns—in Florida and in my own state, Pennsylvania—and it ought to be clear to all of us that there have been times when truthfulness took an awful beating. And now we have a long presidential campaign ahead, during which we can clearly see a lot more of the same."

(b) Careless rhetoric and accusation in political campaigns directed at the business community, p. 1 [A33]:

> "I'm thinking of the careless rhetoric and accusations that are being thrown around these days—their main target being the business community. I'll give you a few examples of what I have in mind: In a recent speech in Pittsburgh, *a prominent presidential candidate* said this: 'What you have in Washington today is government of the money, by the money, and for the money. We're going to drive the moneychangers out of the temple.' At a conference in Washington last month *a potential presidential candidate* said this: 'To

me, the ITT case says it all. The doors of the White House are open wide to every chairman of the board, but they are closed tight to the Americans working man.' " [Emphasis of references to candidates supplied]

(c) Whether business pays its fair share of taxes, pp. 1 and 2 [A33 and A34]:

"As for business taxation, *one of the candidates said this:* 'The time has come for a tax system that says to big business—you must pay your fair share.' [Emphasis of references to candidates supplied]

"That's a reasonable demand, but it implies that we aren't already paying our 'fare share'. My own company has been tagged with that sort of accusation despite the fact that over the past 10 years our taxes have averaged $37 million a year more than our net income. Our total tax expense was nearly $200 million last year, $155 million in 1970, and more than $1.7 billion for the 10 years from 1962 through 1971.

So please think twice before swallowing all this baloney about large corporations not carrying their fair share of the tax burden." [Emphasis supplied]

(d) Closing tax loopholes for the rich and powerful as being radical, p. 2 [A34]:

"But corporations aren't the only targets. *One candidate* talks about '$28 billion in tax loopholes for the rich and powerful' and he calls for tax reform and other economic policies that, in the words of Chet Huntley, are 'far to the left of Norman Thomas.' " [Emphasis supplied]

(e) Improper motives of those who make business enterprise an issue in the campaign, p. 2 [A34]:

"Put it all together and you'll see, as many observers have already warned, that business enterprise is sure to be a major issue during the upcoming presidential campaign. It's bound to be; the temptation is irresistible, at least to anyone who puts political advantage above all else."

(f) The effect of campaign attacks on business upon shoplifting, p. 4 [A36]:

" 'The owners of a shop in Allentown wanted to run a store which sold things to kids at reasonable prices, that didn't "rip-off" the customers. In appreciation, the shoplifters went to work on them.

"The kids steal anything they can get their hands on and put in their pockets," said one proprietor.

"We try to sell things at a low price, but it seems some people just have to steal".'

I don't think I have to add anything to that newspaper story. It speaks for itself Ask yourself whether the situation will improve, or get worse, if the upcoming political campaign features the nations leading politicians preaching that business is evil, that it makes excessive profits by gouging and deceiving the American public. It's something to think about."

(g) The danger to homeowners of closing tax loopholes, p. 4 [A36]:

"Now let's take a look at another specific issue that ought to concern you and me. Everybody's talking about tax reform, but watch out for rhetoric about 'closing the loopholes' that only

benefit 'the rich and powerful.' As *The Wall Street Journal* commented the other day, one of the biggest so-called 'loopholes' is the provision enabling home-owners to deduct mortgage interest and property taxes from Federal taxable income."

(h) The threat embodied in proposed tax reforms, p. 5 [A37]:

> "And talking about personal income taxes, is there a single person here who thinks his taxes are too low? Well there are *candidates* who think they're way too low.
>
> "And that's only the beginning. There are proposals to virtually confiscate inheritances over a certain amount; to end the tax exemption for state and municipal bonds; to reduce depletion and depreciation allowances; to outlaw the tax limitations on capital gains—you name it, somebody's talking about it.
>
> "But there's no need for me to go on and on. You've heard all those proposals, and I hope you see them as I do—not so much as threats to people who are wealthy, but threats to everyone who asks nothing more than the same opportunities that Americans have always had." [Emphasis supplied]

(i) The effect of tax reform upon employment, p. 5 [A37]:

> "All those aims are wholly admirable and we should strive to achieve them. But is this the way to do it? I can't imagine how destroying individual incentive and confiscating savings can possible provide more employment. It would, in fact, have the opposite effect."

(j) The relation of free health care and welfare to alcoholism and mental breakdown, p. 6 [A38]:

> "The Swedes have free health care and cradle-to-grave security. But what does it cost them?
>
> They have just about the highest prices in the world; they consume more alcohol per capita than any other people in the world and they are suffering what amounts to an epidemic of mental breakdowns."

(k) What the populist movement in America really wants, p. 7 [A39]:

> "Is that what the so-called 'populist' movement in America really wants—to crush the human spirit?"

(l) The threat to democracy and freedom of the economic programs of some political candidates, p. 7 [A39]:

> "As sure as I'm standing here, the economic programs *now being preached by some political candidates* would, if implemented, bring an end to democracy and freedom as we know it in this land, not overnight, but in the foreseeable future." [Emphasis supplied]

3. The Folder.

The Folder, [A42-A44], entitled "How You Can Help To Keep The Campaign Honest," was referred to in the Advertisement and was also made available to all persons upon request, along with a copy of the Cort Speech. Sources of information are recommended to the reader to check on the validity of statements made by candidates in articles and speeches. These recommended sources include: The Readers Guide to Periodical Literature, the Public Affairs Information Service at the local library,

encyclopedias, almanacs, informational services of chambers of commerce, local business associations, public affairs or public relations offices of major corporations or of national organizations such as the National Association of Manufacturers, the Chamber of Commerce of the United States, and various trade associations or technical societies [A43].

The Advertisement, the reprint of the Cort Speech and the Folder were prepared and paid for by Bethlehem with the use of corporate funds and without the approval of plaintiff Ash or any other stockholder.

Proceedings in District Court Prior to Judgment.

The action was commenced by Complaint on September 28, 1972. Plaintiff at that time moved for both a temporary restraining order and a preliminary injunction to prohibit Bethlehem from further corporate expenditures for the purpose of disseminating the advertisement, the speech and the folder. On October 13, 1972, the district court denied the temporary restraining order and on October 27, 1972, it denied the preliminary injunction motion, filing its only written opinion in the case [A46-A56]. Plaintiff appealed the denial of the preliminary injunction on November 1, 1972, and sought an injunction pending appeal. On about November 2, 1972, the parties agreed that plaintiff would withdraw the motion for injunction pending appeal conditioned upon a voluntary cessation by Bethlehem of distribution of the advertisement, the speech and the folder pending appeal. After expedited hearing, the Court of Appeals for the Third Circuit affirmed the denial of the preliminary injunction on January 5, 1973, with a two-paragraph opinion [A26], *Ash v. Cort*, 471 F. 2d 811 (3d Cir. 1973). The Court of Appeals held:

> "We affirm the denial of the request for a preliminary injunction. Our holding is narrowly limited. We affirm solely because we view as not clearly erroneous the district court's finding that appellant would not be irreparably harmed by the denial of his request."

On January 15, 1973, defendants moved for an order requiring plaintiff to post security for expenses of litigation under a provision of the Pennsylvania Business Corporation Law, 15 P. S. 1516, providing for security in some cases brought by shareholders to enforce rights of corporations. Defendants sought bond in the amount of $100,000 to indemnify the corporation for legal expenses, in the event judgment was entered against plaintiff [A65]. The district court entered an order, directing that plaintiff post a bond of $35,000 as to Count II, but, as to Count I, no bond was required. The order further gave plaintiff an opportunity to amend to eliminate Count II and thereby obviate bond [A68]. He did so by filing the First Amended Complaint. The order was a nullity, as Count II was not a separate claim, but merely an assertion that the state cause of action in Count I, under federal question jurisdiction, was also able to be adjudicated under principles of pendent jurisdiction.[2]

Plaintiff sought discovery from time to time, during the approximately six months the case was in the District

2. A statement of claim consists of a statement of operative facts that, in aggregate, give rise to a right enforceable in the courts. A court may not dismiss a theory of relief. Accordingly, the striking or dismissal of part of a single claim is a nullity. *Seaboard Machinery Corp. v. Seaboard Machinery Corp.*, 267 F. 2d 178 (2d Cir. 1959); *Marino v. Nevitt*, 311 F. 2d 406 (3d Cir. 1963); *Schwartz v. Eaton*, 264 F. 2d 195 (2d Cir. 1959); *Cooper v. North Jersey Trust Co.*, 226 F. Supp. 972 (S. D. N. Y. 1964).

Moreover, pendent jurisdiction need not be pleaded since the court already has jurisdiction. *Leathers Best Inc. v. S. S. Mormelynx*, 451 F. 2d 800, 809 (2d Cir. 1971).

Court, but was successfully opposed by defendants.[3] Defendants moved for summary judgment on March 29, 1973, and on March 30, 1973, they moved to stay discovery pending a ruling on their summary judgment motion. Among the contentions made by defendants was that the court should not find an implied private cause of action under 18 U. S. C. § 610 because the statute was adequately enforced by the Department of Justice. On July 9, 1973, plaintiff moved for an evidentiary hearing and an opportunity to call witnesses, offering to prove (1) that the Justice Department had historically failed to enforce 18 U. S. C. § 610; (2) that the Justice Department was intentionally made subservient to the reelection goals of the Republican Nixon administration in 1972; and (3) that the Justice Department lacked the requisite staff and resources to enforce the election laws, including 18 U. S. C. § 610 [A82-A86].

On July 12, 1973, the district court entered the following order, without opinion [A87]:

> "And Now, this 11th day of July, 1973, upon a finding that the issue whether plaintiff has an implied right to prosecute a cause of action under 18 U. S. C. § 610 is a question of law to be determined by the Court based upon, inter alia, the language, legislative history and purpose of the Act, It Is Ordered that plaintiff's motion for an evidentiary hearing and for continuation of defendant's motion for summary judgment is Denied. In addition, upon consideration of the entire record, oral argument and briefs submitted by the parties and upon a finding (1) that no legal basis has been presented by the plaintiff to justify the relief sought, and (2) that no genuine issues of material facts exist, It Is Further Ordered that defendants' motion for summary judgment is Granted."

3. The case was in the District Court from September 28, 1972 to November 1, 1972, when appeal was taken from the denial of a preliminary injunction, and from February 9, 1973 to July 12, 1973, when judgment was entered.

Appeal From Summary Judgment.

On July 18, 1973, plaintiff appealed to the United States Court of Appeals for the Third Circuit from the grant of summary judgment. On April 16, 1974, the Court of Appeals reversed the judgment of the district court and remanded for trial, finding the existence of an implied private cause of action under 18 U. S. C. § 610 and of genuinely disputed issues of material facts [A92-A117].

The Court of Appeals held:

(1) Plaintiff has standing as a stockholder, citizen and voter to assert this action [A97].

(2) That to find an implied cause of action in a statute, a court must determine that the provision violated was designed to protect a class of persons including the plaintiff from the harm of which plaintiff complains and that it is appropriate in light of the statute's purposes, to afford plaintiff the remedy sought [A98].

(3) 18 U. S. C. § 610 was designed to protect plaintiff as a stockholder and as a voter and citizen [A101].

(4) Private civil enforcement by injunction can be relatively swift, halting violations prior to elections [A104].

(5) There exist no countervailing reasons for denial of a private cause of action [A104].

(6) Allowance of a private cause of action, whether brought by a citizen to secure injunctive relief or a stockholder to secure injunctions or derivative damage relief is proper to remedy violations of § 610 [A104].

(7) 18 U. S. C. § 610, in specifying acts prohibited, supplements but does not supplant 18 U. S. C. § 591 as it defines "expenditure." [A106].

(8) 18 U. S. C. § 591 prohibits only partisan expenditures [A106].

(9) Communications are not saved from the purview of Section 610 merely because they do not mention candidates by name [A107-A108].

(10) Factual issues remain unresolved as to defendant's violation of 18 U. S. C. § 610.

The Court of Appeals refused to reach defendants' constitutional contentions, noting that they were predicated on the assumption that non-partisan speech was prohibited, that they were never considered or decided by the district court, and that they could be raised on remand.

Defendants petitioned for rehearing *en banc,* which the Court of Appeals denied May 15, 1974. Defendants' motion to stay the mandate of the Court of Appeals, pending disposition of the case in this Court was granted on May 22, 1974. On June 13, 1974, plaintiff moved to take discovery pending appeal in the District Court, which motion was denied on June 27, 1974. Plaintiff appealed this discovery denial on July 11, 1974. On November 15, 1974, the Court of Appeals expedited the appeal, and heard the matter on January 24, 1975. That appeal is pending.

SUMMARY OF THE ARGUMENT.

I.

Under settled principles of statutory construction, the Court of Appeals correctly implied a private cause of action on behalf of stockholders and citizens for violations of 18 U. S. C. § 610. The Court correctly found that plaintiff was within the classes of persons protected both primarily and secondarily by the Act and that policy considerations fully supported implication of a private cause of action, especially since there were no valid considerations opposing such implication. The Court of Appeals rightly perceived the intent of Congress to protect stockholders and citizens from unregulated corporate campaign contributions, and properly concluded that the provision of a private remedy is necessary to effectuate Congressional intent. The Court of Appeals recognized the specious reasoning that absence of an expressed private cause of action under Title II of the Federal Election Campaign Act leads to the conclusion that no such remedy should exist.

The Bethlehem directors contend that the court should disallow an implied cause of action to Respondent, even as a stockholder, based on this Court's recent decision in *National Railroad Passenger Corp. v. National Association of Railroad Passengers,* 414 U. S. 453 (1974). This case is clearly distinguishable in that, *inter alia,* the legislative history of the statute in question there clearly indicated Congressional intent to exclude a private right of action. Nor should this Court look to the history of subsequent legislation for evidence of Congress' intent in passing the legislation at issue.

II.

The Court of Appeals was correct in reversing the District Court's granting of summary judgment on the merits. 18 U. S. C. § 610 does not require the naming of a particular candidate for liability to attach. In addition, there are numerous material factual issues in dispute including, *inter alia*, whether the advertisement, speech and folder are "partisan". Under such circumstances, summary judgment can not be granted.

The First Amended Complaint states a valid claim under 28 U. S. C. §1331 independent of the implication of a private right of action. Expenditure of corporate funds in violation of federal law is *ultra vires* under Delaware law and actionable by stockholders. This cause of action, which turns on 18 U. S. C. § 610, arises under the laws of the United States within the meaning of 1331.

III.

The Court of Appeals was correct in refusing to decide the issue of the constitutionality of 18 U. S. C. § 610. Only after an adjudication on the merits will the constitutional issues be ripe for decision.

Assuming this Court does reach the constitutional issues, Bethlehem does not, as a corporation, enjoy the full protection of the First Amendment to the Constitution of the United States as does a natural person. Furthermore, under established law, 18 U. S. C. § 610 as amended in 1971 is a proper constitutional exercise of Congressional power to regulate elections and to protect our democratic electoral process. It is a narrowly drawn statute which does not violate the First Amendment.

Moreover, 18 U. S. C. § 610 does not violate the due process clause of the Fifth Amendment to the Constitution of the United States.

Argument.

I. Plaintiff Has a Private Cause of Action Under 18 U. S. C. § 610.

A. Standards for Implying a Private Cause of Action.

The Court of Appeals determined that an implied private cause of action is both necessary and appropriate for proper enforcement of the legislative goal embodied in the Federal Election Campaign Act, 18 U. S. C. § 610. In the instant case, there is no explicit indication on the face of the statute or in its legislative history of Congress' intent in regard to the establishment of a private cause of action. In such a case, the courts have conferred a private cause of action upon finding that the following two conditions are met: (1) that the provision was intended to protect a class of persons, including the plaintiff, from the harm of which plaintiff complains; and (2) that it is appropriate in light of the statute's purposes, to afford plaintiff the remedy sought. *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics,* 403 U. S. 388, 395-97 (1971); *Wyandotte Transportation Co. v. United States,* 389 U. S. 191, 200-202 (1967); *J. I. Case Co. v. Borak,* 377 U. S. 426, 431-35 (1964). This principle is particularly applicable when, as here, the statute is criminal. *Texas and Pacific R. R. Co. v. Rigsby,* 241 U. S. 33 (1916).

Obviously where the legislature has clearly indicated its intent to grant or withhold a private cause of action, either implicitly or explicitly, the courts will give effect to such intent. *National Railroad Passenger Corp. v. National Association of Railroad Passengers,* 414 U. S. 453 (1974) ("*Amtrak*" herein). In the absence of any such

clear legislative intent, courts have long realized that they must look to the policies underlying the substantive law to determine if the granting of a private cause of action would effectuate congressional policies. *Texas and Pacific R. R. Co. v. Rigsby,* 241 U. S. 33 (1916). Justice Harlan stated the rule in his concurring opinion in *Bivens v. Six Unknown Agents, supra:*

> ". . . in suits for damages based on violations of federal statutes lacking any express authorization of a damage remedy, this court has authorized such relief where, in its view, damages are necessary to effectuate the congressional policy underpinning the substantive provisions of the statute." 403 U. S. at 403

Similarly, in *Burke v. Compania Mexicana de Aviacion,* 433 F. 2d 1031 (9th Cir. 1970), citing *Wyandotte Transportation Co. v. United States, supra,* the Court of Appeals for the Ninth Circuit succinctly summarized the appropriate set of circumstances from which an implied private cause of action is properly inferred:

> "Where the interest asserted by the plaintiff is within the class that the statute was intended to protect, the harm of the type the statute was intended to forestall, and the statutory criminal penalty inadequate to fully protect the asserted interest, a civil action for damages arises by implication." 433 F. 2d at 1034.

This well-established rule was applied by the Court of Appeals in holding that a private cause of action is implied under § 610.

B. Plaintiff Is Within the Class of Persons Protected by the Act.

The Court of Appeals determined that plaintiff Ash is a member of the class of persons that Congress intended to protect by the Act. See *Wyandotte Transportation Co. v. United States,* 389 U. S. 191, 201-202 (1967); *Texas and Pacific R. R. Co. v. Rigsby,* 241 U. S. 33 (1916); *Burke v. Compania Mexicana de Aviacion,* 433 F. 2d 1031, 1034 (9th Cir. 1970); *Reitmeister v. Reitmeister,* 162 F. 2d 691, 694 (2d Cir. 1947).

18 U. S. C. § 610 is the end product of a series of enactments limiting campaign contributions and spending. See *United States v. International Union United Auto Workers,* 352 U. S. 567, 570-84 (1957). This Court, in *United States v. Congress of Industrial Organizations,* 335 U. S. 106 (1948), stated that § 610 was designed to protect the electorate from the control over elections which corporations might exercise through financial contributions, and to protect stockholders and union members from the use of corporate or union funds for contributions to political parties without the consent of the stockholder or union member:

> "This legislation seems to have been motivated by two considerations. First, the necessity for destroying the influence over elections which corporations exercised through financial contributions. Second, the feeling that corporate officials had no moral right to use corporate funds for contribution to political parties without the consent of the stockholders." 335 U. S. at 113

This comment is borne out by the legislative history of the predecessor of Section 610, the Act of January 26,

1907, 34 Stat. 864. In calling for that legislation, President Theodore Roosevelt stated that "all contributions by corporations to any political committee or for any political purpose should be forbidden by law; directors should not be permitted to use stockholders' money for such purposes." 40 Cong. Rec. 96. These purposes were emphasized in debates on the floors of both Houses in 1971 relating to the amendments to section 610. See Remarks of Senator Goldwater, 117 Cong. Rec. 29330, and Remarks of Representative Hansen, 117 Cong. Rec. 43380-81.

The Third Circuit correctly determined that these underlying purposes of § 610 support the inference that plaintiff is included among the classes of persons meant to be protected by the Act. The dissenting Judge agreed with the majority on this point, stating, "Standing in this case does not trouble me." 496 F. 2d 426. Indeed, as both a Bethlehem stockholder and a registered voter, there can be little doubt that plaintiff is a member of the two classes of persons which Congress intended to protect by the Act: registered voters and union members or stockholders of a corporation which violated the Act. This Court's decision in *United States v. Congress of Industrial Organizations, supra,* clearly establishes this proposition.

The case of *Common Cause v. Democratic National Committee,* 333 F. Supp. 803 (D. C. D. C. 1971) is directly on point. In that case the District Court found an implied private right of action under 18 U. S. C. §§ 608-609, companion statutes to 18 U. S. C. § 610. These statutes, proscribing limits for individual contributions and purchases in support of federal election campaigns and establishing limits to annual receipts and expenditures by political committees, were designed by Congress to protect voters, campaign contributors and workers. 333 F. Supp. at 812-13.

Plaintiffs in *Common Cause* included registered voters and the court concluded that the first of the standards for implying a private cause of action was met. 333 F. Supp. at 813. Plaintiff here is in even a stronger position than the plaintiffs in *Common Cause.* Not only is he a voter, but he is a stockholder in the corporation charged with the alleged acts and for that reason alone he is within a distinct class of persons protected by the statute. This was recognized by the court in *Barber v. Gibbons,* 367 F. Supp. 1102 (E. D. Mo. 1973). That court permitted a union member to sue under 18 U. S. C. § 610 for declaratory and injunctive relief.

C. Implying a Private Cause of Action Will Effectuate Congress' Purpose in Enacting 18 U. S. C. § 610.

Since the primary purpose of § 610 is to prevent corporations and labor unions from influencing federal elections by using their large financial resources, allowing private suits to enjoin or recover such expenditures is clearly consistent with the goals of the statute. As the Court of Appeals found, the implication of a private cause of action is particularly favored where it appears that the private remedy will have a "healthy deterrent effect" on the practices proscribed by the Act. 496 F. 2d at 423-24. See also *Hewitt-Robins, Inc. v. Eastern Freight-ways, Inc.,* 371 U. S. 84, 88 (1962). This deterrent argument is even more persuasive when it seems that the agency empowered to enforce the Act is not completely effective in doing so. See *J. I. Case Co. v. Borak,* 377 U. S. 426, 432 (1964); *Allen v. State Board of Elections,* 393 U. S. 544, 566 (1969); *cf. Holloway v. Bristol-Meyers Corporation,* 485 F. 2d 986, 998 (D. C. Cir. 1973).

The lack of adequate enforcement of § 610 was specifically alleged by Ash in his request for an evidentiary hearing [A82]; such inadequacy becomes apparent when the history of the enforcement of § 610 and its predecessors is considered.[4] Between the years 1916 and 1968 violations of the Act were very rarely prosecuted, especially against corporations, and even more rarely were convictions obtained.[5] The Third Circuit's opinion below specifically noted the problem of selective enforcement:

> "The nature of the prohibited conduct further supports provision of private remedies. Contributions or expenditures to influence federal elections are prohibited; yet the politician whose election is facilitated by violation of § 610 may be in charge of the statute's enforcement. This possible conflict of interest is not simply hypothetical; plaintiff alleges that in the instant case non-enforcement of § 610 by the Justice Department was due to the Department's control by the candidate defendants supported." 496 F. 2d at 423.

In addition, the district court in *Common Cause,* 333 F. Supp. 803 (D. C. D. C. 1971), implied a civil cause of action for violation of § 608 and § 609 of the same Act by also noting the Justice Department's inability to ensure

4. 18 U. S. C. § 610 was originally enacted as part of Tillman Act of 1907, ch. 420, 34 Stat. 864. In 1925 it was amended and included in the Federal Corrupt Practices Act of 1925, ch. 368, Title III, § 313, 43 Stat. 1074.

5. E. M. Epstein, Corporations, Contributions & Political Campaigns Federal Regulation in Perspective 15-16 (1968). See also Berry & Goldman, Congress and Public Policy; A Study of the Federal Election Campaign Act of 1971, 10 Harv. J. Legis. 331 (1973).

full enforcement of the Federal election laws. 333 F. Supp. at 809-813. See *Testimony of Deputy Atty. Gen. Kleindienst,* Hearings before the Subcommittee on Commerce (S. 1, S. 382, S. 956) 92nd Congress, 1st Sess. pp. 514-546 (March 31, 1971), and Hearing Before The Subcommittee on Privileges and Election of the Committee on Rules and Administration (S. 382) 92nd Cong., 1st Sess. pp. 50-67 (May 24, 1971); *Powell v. Katzenbach,* 359 F. 2d 234 (D. C. Cir. 1965); *United States v. Cox,* 342 F. 2d 167 (5th Cir. 1965).

The Court of Appeals, therefore, was merely following the well-established proposition that the impact of remedial legislation is enhanced when individual citizens are permitted to enforce the legislation.[6] See also *Schwartz v. Romnes,* 357 F. Supp. 30 (S. D. N. Y. 1973), *rev'd on other grounds,* 495 F. 2d 844 (2d Cir. 1974); *Barber v. Gibbons,* 367 F. Supp. 1102 (E. D. Mo. 1973).

Additional support for the implication of a private cause of action lies in the insufficient deterrent effect of the criminal sanctions provided in § 610. An examination of the sanctions provided in § 610 reveals that, as in other corporate crimes:

> "[T]he criminal fine as presently administered against the endocratic corporation . . . is totally ineffective as a profit diminishing sanction. Its ineffectiveness is primarily attributable to the exceedingly low maximum penalties permitted by governing statutes.[7]

6. See Comment, The Federal Election Campaign Act of 1971; the Reform of the Political Process? 60 Geo. L. J. 1309, 1328 (1972).

7. Comment, Increasing Community Control Over Corporate Crime—A Problem in the Law of Sanctions, 71 Yale L. J. 280, 285-86 (1961).

The maximum fine that can be imposed on a corporation under § 610 is $10,000 for a willful violation. The ineffectiveness of such fines is obvious for they are imposed on the innocent stockholders.[8] Holding the directors accountable to stockholders is entirely appropriate to ensure that the integrity of the electoral system will be preserved.

The Court of Appeals stressed the relative expeditiousness of civil suits as compared to criminal actions and the probable vigilance of shareholders in detecting violations that threaten their economic interests. The Court stated:

> "The section's primary focus is on preventing the corruption of elections by corporate contributions. Violations of § 610 are, we presume, most likely to occur in the period immediately preceding an election, and, given the delays incident to criminal investigation and grand jury indictment as well as trial, the election may well be over before the section's violation is determined. Private enforcement, particularly by injunction, can be relatively swift. 496 F. 2d at 423-424

It is clear, and the Court of Appeals recognized, that this Court's recent holding in *Amtrak*, refusing to permit a private cause of action under § 307(a) of the Rail Passenger Service Act of 1970, is not controlling in this case. 496 F. 2d at 421-22. Contrary to the arguments of the Bethlehem directors, the rationale of *Amtrak* was carefully considered and followed by the court below. The tenets of statutory construction enunciated by this Court in *Amtrak* are identical to those relied upon by the Court

8. Increasing Community Control Over Corporate Crime, *supra*, n. 5, 71 Yale L. J. at 280.

of Appeals in construing § 610. In both *Amtrak* and the Court of Appeals' opinion in *Ash*, it was recognized that a private cause of action will not be implied from a federal statute if the expressed statutory remedies are intended to be exclusive. While the maxim "*expressio unius est exclusio alterius*" is a helpful guide, of course the courts must implement congressional intent as discerned from all available sources. As the Third Circuit appropriately pointed out in *Ash*, specifically in reference to this Court's holding in *Amtrak:*

> "This rule of statutory construction [*expressio unius est exclusio alterius*] does not alter the process used to determine if a cause should be inferred in the absence of statutory language indicating legislative intent; rather, it aids the court merely in determining when legislative intent to preclude a remedy can be fairly implied." 496 F. 2d at 421

In *Amtrak*, this Court concluded that the remedies expressed on the face of the statute could logically be said to be exclusive. 414 U. S. at 458. No such finding may be made in the instant case. In *Amtrak* the statute provided for a remedy of a civil action to be prosecuted by the Attorney General for alleged violations. In the instant case, the statute provides no civil remedy for the harms plaintiff sues to correct. While the directors point out that Title III of the Federal Election Campaign Act of 1971 provides a civil cause of action, this case is brought under a different statutory provision, the Federal Corrupt Practices Act, 18 U. S. C. § 610, as amended by Title II of the Federal Election Campaign Act. Title III pertains to certain reporting and disclosure requirements imposed on candidates and

campaign committees. Plaintiff, however, is sueing under an entirely different statutory provision for entirely different harms. The directors' reliance on the *expressio* maximum is misplaced; while it may indicate legislative intent not to permit a private cause of action under Title III of the Federal Election Campaign Act, it says nothing about Title II, 18 U. S. C. § 610.

Moreover, *Amtrak* turned on the finding that a private cause of action would be contrary to a basic purpose of the Act—to protect the railroads from private litigation which may endanger the "economic viability (of) a basic rail passenger system." 414 U. S. at 463. In contrast, the purpose of 18 U. S. C. § 610 would be well served by permitting a voter and shareholder to recover illegal campaign contributions.

More importantly, an amendment to the Rail Passenger Service Act of 1970 which would have permitted a private cause of action was specifically considered and rejected by Congress.[9] Thus, in *Amtrak* there was explicit and specific evidence of Congressional intent to exclude a private cause of action. As the Court of Appeals noted, in this case there is a lack of evidence in the legislative history that Congress considered a civil remedy in passing the Federal Election Campaign Act or the Federal Corrupt Practices Act. In order, therefore, to effectuate Congressional intent, it is necessary to look to the policies and purposes of the election statute in determining whether it is appropriate to imply a private cause of action. Neither the *Amtrak* case nor the judicial maxim "*expressio unius est exclusio alterius*" dictates a contrary result.

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9. Supp. Hearings on H. R. 17849 and S. 3706 before Subcommittee on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Commerce, 91st Cong. 2d Sess., SEF-9-62 at 134 (1970). See also 414 U. S. at 459.

The courts have consistently held that the implication of a private civil remedy is harmonious with an explicitly provided criminal remedy. *Wyandotte Transportation Corp. v. United States,* 389 U. S. 191 (1967). In *Texas and Pacific R. R. Co. v. Rigsby,* 241 U. S. 33 (1916), this Court inferred a private cause of action for a violation of a criminal statute and established the rule that the statutory provision of a penal remedy may imply the need for a remedial private civil cause of action. In the case *sub judice* there is a definite need for a remedial private cause of action. Only by permitting a stockholder whose corporation has made illegal campaign contributions from corporate funds or a voter whose franchise has been damaged by the influence of the criminal use of corporate funds to sue, will violations of the Act be remedied and Congressional purpose served. The criminal penalties provided by 18 U. S. C. § 610 are clearly inadequate as remedies for violations of the Act.

Not only do criminal penalties fail to compensate stockholders, they compound their loss by draining additional corporate funds which ultimately belong to them. Stockholders' abilities to control expenditures of funds is limited to voting the directors out of office or suing to enjoin misappropriations. In large corporations, such as Bethlehem, the latter alternative is the only one feasible. It would be anomalous for Congress to legislate to protect stockholders from illegal contributions of corporate funds while withholding from stockholders the only effective means for securing such protection. Surely Congress could not have intended such a result. In *City of Phoenix v. Drinkwater,* 46 Ariz. 470, 52 P. 2d 1175 (1935), the Supreme Court of Arizona used a similar analysis to imply a private cause of

action for workers damaged by violations of a minimum wage law.[10]

The recent decision in *Stewart v. Travelers Corp.*, 503 F. 2d 108 (9th Cir. 1972), is directly on point. The statute before the Court in *Stewart* was the Consumer Credit Protection Act, 15 U. S. C. § 1674(a). The Ninth Circuit, citing *Burke v. Compania Mexicana de Aviacion,* 433 F. 2d 1031 (9th Cir. 1970); *Common Cause v. Democratic National Committee,* 333 F. Supp. 803 (D. C. D. C. 1971); *Fagot v. Flinkote Co.,* 305 F. Supp. 407 (E. D. La. 1969); and *Willis v. Trans World Airways, Inc.,* 200 F. Supp. 360 (S. D. Cal. 1961), noted at the outset that private civil remedies for violations of federal statutes are regularly implied even when criminal sanctions and administrative enforcement are expressly authorized. The Court then considered and

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10. The Court stated at 52 P. 2d at 1177:

> "The statute, it will be seen, has a twofold purpose. One is to secure to the individual workman a minimum living wage, fixed by law, and the other is to penalize the employer who fails to pay the wage. With both purposes before us, we certainly think that it would be defeating the intent of the Legislature, so far as the first is concerned, if we were to hold that the very ones whom the law is intended to protect were helpless to secure that protection, and must satisfy themselves with knowing that somebody had gone to jail or paid a fine for violating the law. Such would, indeed, be a Pyrrhic victory for the workman, consoling perhaps to his feelings, but of very little value in giving to him what the law says he has earned and is due him.
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> * * *
>
> "We hold * * * that in view of the dual purposes of the law, it impliedly carries with it the common-law remedy which alone can insure that the class for whose aid it was adopted may be adequately protected in the right given by the law."

This decision was cited with approval in *Callaway v. Downing Co.,* 172 A. 2d 260 (Del. 1971).

rejected defendant's argument that because specific and limited civil remedies exist elsewhere in the Statute in question, the failure to provide for a remedy in Section 1674(a) demonstrates that Congress intended to exclude a private civil remedy for violation of § 1674. Thus the Ninth Circuit answers the identical argument made by the Bethlehem directors herein—that because there are specific limited private remedies provided for violations of Title III of the Act, it can be inferred that Congress intended no private remedy for violations of Title II including § 610:

> "Finally, Appellees assert that because specific and limited civil remedies exist in § 1640 of Subchapter I of the Act, the absence of a similar provision in Subchapter II shows the intent to exclude a private civil remedy for § 1674. In fact, they are urging this Court to apply the doctrine of *expressio unius est exclusio alterius*—the express authorization of a remedy in one section of a statute indicates that an omission of that remedy from other sections was intended by the legislature. While in the past some courts (including this one) have used this rule when denying implied actions under particular statutes, the rule has been criticized. Recently (as recognized by this court's holdings) the tendency is to limit the *expressio unius* rule in favor of construing an act so as to effectuate its dominant purpose.

However, in this case, neither the existence of alternative remedies under the same statute or under state law, nor the fact that enforcement of the federal statute is expressly vested in an administrative agency overcomes the need to imply

> a private right of action for § 1674(a) violations." 503 F. 2d at 111-112. [footnotes omitted]

The Court went on to reason:

> "Whatever may be the rule of 'adequacy' elsewhere, we believe that when there is no clear congressional intent contrary to the implication of private civil remedies, the adequacy of a statute's express remedies (or alternatively, the necessity of implied private ones) must be determined according to whether those express remedies ensure the *full* effectiveness of the congressional purpose underlying the statute. In this sense, when the statute in question seeks to protect an individual's interest, it is not enough for it to have some enforcement mechanisms: the initial question is whether the statute's protection might be enhanced by allowing private civil relief." 503 F. 2d at 112. [footnote omitted]

In *Stewart* the primary purpose of the statute was to protect against hardships and disruptions resulting from employee discharges due to garnishment of wages. 503 F. 2d at 113. Permitting private civil actions by those aggrieved for violations of the statute obviously effectuate the act's purpose. Similarly here, where the purpose of the statute is to control the influence corporations and labor unions can exert over elections and to prevent corporate funds from being used in elections without the consent of that corporation's stockholders, a private civil action is necessary for effectuation of the Congressional purpose.

The Bethlehem directors urge the Court to restrict the parties allowed to enforce the Act and the permissible remedies on the assumption that the constitutionality of § 610 is doubtful. Accepting the assumption for argument, the conclusion does not follow. Conferring a private cause of action has no bearing on the constitutionality of the Act. The issue of a private cause of action should not be decided on the basis of the mere spectre of constitutional issues.

For all of the above reasons, the implication of a cause of action for voters and stockholders is extremely appropriate.

D. Federal Election Campaign Act Amendments of 1974 Do Not Contradict the Third Circuit's Decision.

1. Subsequent Legislative History Should Not Be Considered.

In 1974, Congress amended the Federal Election Campaign Act by enacting the Federal Election Campaign Act Amendments of 1974, P. L. 93-443, 88 Stat. 1263. Petitioners contend that these amendments throw a "cross light" on congressional intent not to provide a private remedy under § 610.

Reference to subsequent legislative enactments or subsequent statements of legislative intent to substantiate a particular interpretation of a prior congressional enactment is of dubious value at best. Recently, in *Blanchette v. Connecticut General Insurance Corporation,* 95 S. Ct. 335 (1974), this Court specifically refused to resort to subsequent evidence of legislative intent and held that such evidence is not indicative of the legislative intent of Congress before the Act was passed:

"Finally, reliance is put on what is referred to as 'subsequent legislative history' in the form of statements by Congressmen during Oversight Hearings of the House Subcommittee on Transportation and Aeronautics on June 14, 1974, and on an *amicus* brief filed in this Court on behalf of 38 Congressmen. But post-passage remarks of legislators, however explicit, cannot serve to change the legislative intent of Congress expressed before the act's passage. See, e.g., United States v. United Mine Workers of America, 330 U. S. 258, 282 (1947). Such statements 'represent only the personal views of these legislators, since the statements were . . . [made] after passage of the Act.' National Woodwork Manufacturers' Assn. v. NLRB, 386 U. S. 612, 639, no. 34 (1967) . . .'" 95 S. Ct. at 353.

In *United States v. United Mine Workers,* 330 U. S. 258 (1947) the Supreme Court was similarly asked to rely upon later expressions of Congressional intent made many years after the passage of the Norris-LaGuardia Act to ascertain the impact of that act on the jurisdiction of federal courts to issue injunctions in certain labor disputes. The court declined to entertain such testimony, stating, "We fail to see how the remarks of these senators in 1943 can serve to change the legislative intent of congress expressed in 1932 . . ."

The probative value of subsequent legislative enactments should be no greater than that accorded the post-passage statements of Congressmen regarding legislative intent. Actually, the Bethlehem directors have completely misunderstood the relevance of successive Congressional acts to the question of legislative intent. The proper inquiry is directed not forwards, but backwards:

> "There is no better key to a difficult problem of statutory construction than the law from which the challenged statute emerged. Remedial laws are to be interpreted in the light of previous experience and prior enactments." *United States v. Congress of Industrial Organizations,* 335 U. S. 106, 112-113 (1948).

Moreover, looking forward is particularly inappropriate where, as here, the subsequent enactment establishes an entirely new remedial scheme, providing for the creation of a special federal regulatory agency to process certain violations of the Federal Election Campaign laws. The most that can be said is that such sweeping revision indicates Congressional dissatisfaction with the previous enforcement mechanisms of the Act. The 1974 Amendments cannot be interpreted, however, as having any bearing on Congressional intent at the time the 1971 act was passed.

2. Assuming, Arguendo, the 1974 Amendments to Federal Election Campaign Act and Debates Thereon Were Relevant, They Support Implication of a Private Right of Action Under 18 U. S. C. § 610.

The Federal Election Campaign Act Amendments of 1974 were, in part, a clear response to the inadequacy of the Justice Department as sole enforcement agency of § 610. Congressional sentiment in 1974 was entirely in accord with the Third Circuit's observation that:

> "The nature of the prohibited conduct further supports provision of private remedies. Contributions or expenditures to influence federal elections are prohibited; yet the politician whose election is

> facilitated by violation of § 610 may be in charge of the statute's enforcement. This possible conflict of interest is not simply hypothetical . . ." 496 F. 2d at 423. [A103]

Members of Congress put the matter more bluntly. Speaking in support of the 1974 Amendments, Senator Weicker said, at 120 Cong. Rec. (daily ed. April 1, 1974) S 4927:

> "Mr. President, we have seen the abuse, of governmental power in the FBI, the CIA, the military intelligence, and the various law enforcement agencies—the internal security of the Justice Department . . .
>
> • • •
>
> ". . . I am not going to be a party to giving the Government, with all of its power, additional power in this area, until the government can prove itself.
>
> "I feel much safer with the American people than I do with the government on any aspect of it.
>
> "I stated at the outset of my talk that in the participation of the American people in the democratic process lies our greatest safeguard against the abuses which occur within the political process."

As is clear from the provisions of the Amendments themselves, Congress intended by the 1974 Amendments to create a bipartisan Commission, apart from the executive branch, to have primary jurisdiction over enforcement of the Act. The six members are to serve for staggered terms of six years [§ 310(a)(2)]. Members are to be chosen on the basis of "their maturity, experience, integrity, *impartiality,* and good judgment and shall be chosen from among individuals who, at the time of their appointment, are not elected or appointed officers or employees in the *executive,* legislative or judicial branch of Government of the United States" [Emphasis supplied] [§ 310(a)(3)].

The 1974 Amendments expressly grant authority to citizens to bring complaints before the newly created Commission, which now has *primary* jurisdiction of such complaints [§ 314(2)(1)(A)]. While private actions in federal courts are not expressly authorized, they are clearly intended, conditioned upon exhaustion of new administrative remedies before the Commission. The *Joint Explanatory Statement of the Committee of Conference,* which reported the bill in final form, states:[11]

> ". . . First, the Commission is given power to bring civil actions in Federal district courts to enforce the provisions of the Act where its informal methods of obtaining compliance fail to correct violations. Second, the Commission is given *primary* jurisdiction for the enforcement of the provisions of the Act. Thus, any person *must exhaust* his administrative remedies with respect to violations under this Act."[12] [Emphasis supplied].

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11. "Federal Election Commission—Investigations and Hearings —Conference Substitute," House of Rep. Report No. 93-1438, p. 94.

12. This observation was restated almost verbatim with the addition of the word "first" by Congressman Brademas, speaking in favor of the Bill. 120 Cong. Rec. (Daily Ed., October 10, 1974) H 10328:

> "Mr. Speaker, it was the intent of the conferees that the Federal Election Commission have primary jurisdiction in all election law matters and that persons, individuals or organizations who may have complaints about possible violations *first* exhaust their administrative remedies with the Commission . . ."

The intent of Congress to allow continued private actions can also be inferred from the absence of an express prohibition in light of events from 1971 to 1974. Congress was well aware of the widely publicized private cases and the holdings of lower federal courts that a private cause of action was implied.[13]

The Bethlehem directors quote Congressman Wayne Hayes as construing the 1974 Amendments to preclude private actions because, in his view, they may be abusive. Congressman Hayes' views are contradicted by the Amendments themselves, the *Joint Explanatory Statement,* and the remarks of other Senators and Congressmen. This is a clear example of a Congressman attempting to recover by a speech what he lost in a bill.

Thus, even assuming subsequent legislative history were relevant, the legislative history of the 1974 Amendments to the Federal Election Compaign Act supports the conclusion that a private cause of action should be implied.

II. The Court of Appeals Was Correct in Holding That Summary Judgment Should Not Have Been Entered Against Plaintiff.

A. Introduction.

The Bethlehem directors are urging this Court to reinstate the District Court's order granting its motion for summary judgment. The District Court, without an opinion, granted defendants' motion, apparently on the grounds stated in its previous decision denying preliminary injunc-

13. *Ash v. Cort,* 496 F. 2d 416 (3d Cir. 1974); *Barber v. Gibbons,* 367 F. Supp. 1102 (E. D. Mo. 1973); *Common Cause v. Democratic National Committee,* 333 F. Supp. 803 (D. C. D. C. 1971); *Common Cause v. Finance Committee to Re-Elect the President,* D. C. D. C., Civ. Act. No. 1780-72; *Common Cause v. TRW,* D. C. D. C., Civ. Act. No. 980-72.

tion [A46] that there is no private cause of action pursuant to § 610 and that, even if there were such a private cause of action, defendants, on the facts presented herein, were nevertheless entitled to judgment as a matter of law. The Court reasoned that the meaning of "contribution or expenditure" in § 610 was governed by the definition of those terms in 18 U. S. C. § 691 (1970), as amended (Supp. II 1972); that § 591 requires a purpose to influence the nomination or election of a particular person; and that Bethlehem's advertisements and pamphlets were not designed to influence the election of any person. The Court of Appeals reversed the District Court, concluding that "since dispute exists as to a material factual issue, the district court erred in granting summary judgment and denying plaintiff's motion for an evidentiary hearing." 496 F. 2d at 425-426. The Court of Appeals correctly held that a private cause of action does lie for violations of Section 610; that plaintiff as a stockholder of Bethlehem and as a voter and citizen may assert such a claim; that a particular candidate's name need not be mentioned in order for a cause of action to be stated under § 610; and that factual issues remain to be decided. In addition, the Court noted the existence of plaintiff's state law allegations.

B. § 610 Does Not Require Naming the Candidate.

The District Court held that because the speech, advertisement and folder did not name a particular candidate, they therefore could not come within the prohibitions of § 610.

18 U. S. C. § 610 prohibits a corporation from making a "contribution or expenditure" in connection with federal elections. Section 591(f)(1) of the Act defines expenditure "when used in section . . . 610" as:

> ". . . a purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value . . ., made for the purpose of influencing the nomination for election, or election, of any person to federal office."

In 1971, § 610 was amended so as to add the following definition of the phrase "contribution or expenditure":

> "Any direct or indirect payment . . . to any candidate, campaign committee or political party or organization."

This definition in § 610 supplements the § 591 definition.

The Courts have made it clear that "[t]he evil at which Congress has struck in § 313 (now 18 U. S. C. § 610) is the use of corporation or union funds to influence the public at large to vote for a particular candidate or a particular party." *United States v. International Union United Auto Workers,* 352 U. S. 567, 589 (1957). The Third Circuit was correct in its observations that this evil is not lessened merely because no name is mentioned and that nothing in the language or legislative history supports an interpretation of §§ 591 and 610 that the particular candidate must be named in order for liability to attach. As the Court stated:

> "Nothing in the language or legislative history supports an interpretation of sections 591 and 610 that would make lawful an expenditure simply because in the communication it paid for no candidate was named. There is no evidence Congress thought the American public so unperceptive that it would recognize a statement as supporting or attacking a particular candidate only by use of his name; such a requirement would eviscerate § 610." 496 F. 2d at 425.

To require, as the directors urge, the naming of the particular candidate would provide would-be violators with another way of circumventing the clear command of the statute. A similar loophole was noted by Congress when it originally extended the meaning of contribution to include "expenditure" in 1947. Previously, the concept of "contribution" had been limited to direct gifts or direct payments. Addition of the term "expenditure" was thus considered necessary "(s)ince it was obvious that the statute as construed could easily be circumvented through indirect contributions . . ." *United States v. Congress of Industrial Organizations,* 335 U. S. 106 (1948). To adopt the narrow construction of § 610 favored by the directors would likewise circumvent the statute. Clearly partisan statements capable of only one interpretation, obviously referring to a particular candidate or party, would nevertheless escape prosecution merely because the particular candidate or party was not named; i.e., because the reference was indirect, rather than direct.

Here a review of the advertisement, speech, and folder, show the obvious partisan nature of the publication. Defendant Cort continually referred to "a prominent presidential candidate," "a potential presidential candidate," "one of the candidates," and attacked that candidate's views. Given the fact that in August and September, 1972, when this speech was reprinted and the advertisements appeared, there were only two presidential candidates, one being the incumbent President of the United States, only one individual could possibly or logically have been the target of these attacks—the candidate of the Democratic Party. Drawing an analogy from the law of defamation; it is well settled that one need not be named to be defamed.[14]

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14. Prosser, *On Torts,* 3rd edition, Defamation, § 106 (1965), at p. 767, states:

> "A publication may clearly be defamatory as to somebody, and yet on its face make no reference to the individual plaintiff.

As the Court of Appeals held, "the American public is [not] so unperceptive that it would [not] recognize a statement as supporting or attacking a particular candidate only by the use of his name." 496 F. 2d at 425.

C. Standards for Granting Summary Judgment.

The use and purpose of a motion for summary judgment was well stated by the Eighth Circuit in *Traylor v. Black, Sivalls & Bryson, Inc.*, 189 F. 2d 213, 219 (8th Cir. 1951):

> "A summary judgment is to be entered in a case if, but only if, the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Rule 56(c), Federal Rules of Civil Procedure. A summary judgment upon motion therefor by a defendant in an action should never be entered except where the defendant is entitled to its allowance beyond all doubt. To warrant its entry the facts conceded by the plaintiff, or demonstrated beyond reasonable question to exist, should show the right of the defendant to a judgment with such clarity as to leave no room for controversy, and they should show affirmatively that the plaintiff would not be entitled to recover under any discernible circumstances. Ramsouer v. Midland Valley R. Co., D. C. Ark., 44 F. Supp. 523, reversed on other grounds, 8 Cir., 135 F. 2d 101. A summary judgment is an extreme remedy, and, under the rule, should be awarded only when the truth is quite clear. American Insurance Company v. Gentile Brothers Company, 5 Cir., 109 F. 2d 732; Shultz v. Manufacturers & Traders Trust Company, D. C. N. Y., 1 F. R. D. 451; Drittel v. Friedman, D. C. N. Y., 60 F. Supp. 999; U. S. ex rel. Ryan v. Broderick, D. C. Kan., 59 F. Supp. 189. And all reasonable doubts touching the existence of a genuine issue as to a material fact must be resolved against the party moving for summary judgment. Sarnoff v. Ciaglia, 3 Cir., 165 F. 2d 167."

This Court has stated that, on a motion for summary judgment, the evidence presented must be construed in favor of the non-moving party, who is to be given the benefit of all the reasonable doubts and inferences in determining whether a genuine issue exists as to a material fact. Moreover, the burden is on the moving party to establish the absence of any genuine issues as to material facts. *Adickes v. S. H. Kress and Company*, 398 U. S. 144 (1970). See also *United States v. Diebold, Inc.*, 369 U. S. 654, 655 (1962); *Associated Hardware Supply Co. v. Big Wheel Distributing Co.*, 355 F. 2d 114 (3d Cir. 1965); *Heyward v. Public Housing Administration*, 238 F. 2d 689, 696 (5th Cir. 1956).

In fact, summary judgment may not be granted unless the movant has shown that there is not "the slightest doubt

14. (Cont'd.)
In such a case, the plaintiff must sustain the burden of pleading and proof, by way of 'colloquium,' that the defamatory meaning attached to him. If he fails to do so, he has not made out his case. He need not, of course, be named, and the reference may be an indirect one, with the identification depending upon circumstances known to the hearers, and it is not necessary that every listener understand it, so long as there are some who reasonably do; but the understanding that the plaintiff is meant must be a reasonable one, and if it arises from extrinsic facts, it must be shown that these were known to those who heard."

as to a factual dispute." *Clausen and Sons, Inc. v. Theo. Hamm Brewing Co.*, 395 F. 2d 388, 389 (8th Cir. 1968); *Morrissey v. Proctor & Gamble Co.*, 379 F. 2d 675, 677 (1st Cir. 1967); *Brady v. Hearst Corp.*, 281 F. Supp. 637, 642 (D. Mass. 1968). Summary judgment may be granted only when the movant has shown his "right . . . to a judgment with such clarity as to leave no room for controversy, and . . . that plaintiff would not be entitled to recover under any discernible circumstances." *Traylor v. Black, Sivalls & Bryson, Inc.*, 189 F. 2d 213, 216 (8th Cir. 1951).

D. Material Factual Issues Remain Unresolved and for That Reason Summary Judgment Is Inappropriate.

1. Serious Dispute Exists as to Whether the Speech, Folder and Advertisement Are Expenditures or Contributions in Violation of Section 610.

The proper interpretation of "expenditure" is that adopted by this Court in the *International Union United Auto Workers* case, that is, that an expenditure does not come within the purview of the statute unless it is for an activity which constitutes "active electioneering." *United States v. International Union United Auto Workers, supra,* at 592. See also *United States v. Lewis Food Co.*, 366 F. 2d 710, 712 (9th Cir. 1966). Indeed, the alleged violations of § 610 present in both *International Union United Auto Workers* and *Lewis Food* are virtually identical to the allegations contained herein and are dispositive of this case.

In *Lewis,* the indictment charged, *inter alia,* that the defendant, Lewis Food, had paid an advertising agency to place an advertisement in various California newspapers concerning candidates for federal office. In *International Union United Auto Workers,* the defendant was charged with using union dues to sponsor commercial television broadcasts designed to influence the electorate to select certain candidates for Congress in the 1954 election. In both instances, the District Courts had dismissed the indictments; on appeal, both rulings were overturned.

In *International Union United Auto Workers,* the Supreme Court stated:

> "To deny that such activity, either on the part of a corporation or a labor organization, constituted an "expenditure in connection with any [federal] election" is to deny the long series of congressional efforts calculated to avoid the deleterious influences on federal elections resulting from the use of money by those who exercise control over large aggregations of capital. More particularly, this Court would have to ignore the history of the statute from the time it was first made applicable to labor organizations. As indicated by the reports of the Congressional Committees that investigated campaign expenditures, it was to embrace precisely the kind of indirect contribution alleged in the indictment that Congress amended § 313 to proscribe 'expenditures.'" 352 U. S. at 585.

Moreover, both of these cases recognize that whether or not such an advertisement as that involved in this case constitutes a violation of the Act is clearly a question of fact for the jury:

> "We agree with the government, however, that a jury question was presented as to whether the advertisement in this case . . . was designed to influence the public at large to vote for or against particular candidates." 366 F. 2d at 712 (*U. S. v. Lewis Food*).

In addition, Senator Taft repeatedly recognized in the debate on § 304, that prosecutions under the Act may present difficult questions of fact. See 352 U. S. 585-587, n. 1. Examples of such factual questions might include:

> The broadcast (advertisement) paid for out of the general dues (funds) of the union (corporation) membership or may the funds be fairly said to have been obtained on a voluntary basis? Did the broadcast reach the public at large or only those affiliated with appellee? Did it constitute active electioneering or simply state the record of particular candidates on economic issues? Did the union (corporation) sponsor the broadcast (advertisement) with the intent to affect the results of the election? *International Union United Auto Workers, supra* at 592.

Finally, a portion of the Senate debate preceding the passage of the Taft-Hartley Act, 29 U. S. C. A. § 141, et seq., had direct bearing on the problem presented in this case:

> "Mr. Pepper. . . . Suppose that in the 1948 campaign, Mr. William Green, as president of the American Federation of Labor, should believe it to be in the interest of his membership to go on the radio and support one party or the other in the national election, and should use American Federation of Labor funds to pay for the radio time. Would that be an expenditure which is forbidden to a labor organization under the statute?
>
> "Mr. Taft. Yes." 93 Cong. Rec. 6439.

Thus for the purpose of ruling on the summary judgment motion and since no discovery has been permitted in this case, the Court was bound to accept as true the plaintiff's allegations and their fair inferences, including the following facts: that at some time in 1971 or 1972 defendants entered into a plan which had as its ultimate purpose to influence the United States electorate to help bring about a Republican Party victory in the 1972 Presidential election and which plan involved the utilization of Bethlehem's resources and the expenditure of its funds [First Amended Complaint, paragraphs No. 13, 14, 15, A72-A73]; that in furtherance of said plan and purpose, defendants caused corporate resources, including the expenditure of substantial funds in excess of $500,000 to be utilized in connection with the political campaign [First Amended Complaint, paragraphs Nos. 15, 20, A73-A74], including causing an advertisement to run nationally at corporate expense, which was blatantly partisan on its face [First Amended Complaint, paragraphs No. 15, 16, 19, A73-A74]. Since these allegations clearly state that defendants planned and did use corporate funds in connection with the 1972 campaign for the purpose of influencing its outcome, there can be no question that the First Amended Complaint states a violation of 18 U. S. C. Section 610, by defendants.

2. Plaintiff's Complaint Alleges Other Illegal Expenditures in Addition to the Speech, Advertisement and Folder.

The First Amended Complaint alleges that defendants entered into a course of conduct in violation of the Act which included not only distribution and publication of the advertisement, speech, and folder, but also the expenditure of corporate funds in connection with the 1972 Presidential election. Plaintiff's First Amended Complaint states:

> "13. At some time in 1971 or 1972, defendants entered into a plan involving the utilization of Bethlehem Steel's resources, including the ex-

penditure of its funds, in connection with the 1972 United States presidential election.

14. The ultimate purpose of said plan was to influence the United States electorate to help bring about a Republican Party victory in said election. This purpose was solely in furtherance of the individual interests and beliefs of defendants and was in violation of state and federal law, and in derogation of the rights of the United States public, and of the approximate one half of the shareholders of Bethlehem Steel that are registered members of the Democratic political party.

15. Thereafter, in furtherance of said plan and purpose, defendants caused, and continue to cause, corporate resources to be utilized, including the expenditure of substantial funds in connection with said political campaign, including, inter alia, their causing to be prepared and disseminated at corporate expense, an advertisement entitled "I Say Let's Keep the Campaign Honest. Mobilize 'Truth Squads' . . .", attributed to defendant Cort. [A72-A73]

It is clear, therefore, that even if the advertisement, speech, and folder at issue were not in violation of the Act, plaintiff has nevertheless alleged separate and substantial violations in the expenditure of Bethlehem funds to influence the last presidential election. "Utilization of . . . resources," as used in the First Amended Complaint, includes both contributions and expenditures of funds, services of employees, and use of property. A jury trial has been demanded. Summary judgment obviously is inappropriate under these circumstances.

E. Plaintiff's Complaint States a Valid Cause of Action Cognizable in Federal Court.

It has long been established that a stockholder may maintain an action in equity for injunctive relief and damages arising out of *ultra vires* expenditures of corporate funds by the directors. *Dodge v. Woolsey,* 18 How. 331 (1855). This is particularly true under Delaware law, the state of incorporation of Bethlehem. *Toebelman v. Missouri Kansas Pipe Line,* 130 F. 2d 1016 (3d Cir. 1942); *Steinberg v. Adams,* 90 F. Supp. 604 (S. D. N. Y. 1950); *Keenen v. Eshleman,* Del. Ct. 1938, 2 A. 2d 904. See also *Abrams v. Allen,* 297 N. Y. 52, 74 N. E. 2d 305 (1947); Fletcher, *Cyclopedia of the Law of Corporations,* Vol. 13, 1970, revised volume, Chapter 58, § 5915.1, 5928 pp. 298-299, 316. This principal applies to unlawful political expenditures. *Lustwerk v. Lytron, Inc.,* 344 Mass. 647, 18 N. E. 2d 871 (1962). *Schwartz v. Romnes,* 357 F. Supp. 30 (S. D. N. Y. 1973), *rev'd on other grounds* 495 F. 2d 844 (2d Cir. 1974) *Miller v. A. T. T.,* No. 73-2007 (3d Cir. 1974). Actions carried out in violation of federal law by Delaware corporations are *ultra vires.* Delaware Code Annotated, Title 8, Section 101; 122(6) Fletcher, *supra,* Vol. 6, 1968 revised Vol. Chapter 24, § 2491, p. 335.[15]

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15. The relevant provisions of Delaware law state:

"SUBCHAPTER I. FORMATION.

"§ 101. Incorporators; purposes of corporation

"Any number of persons, not less than three, may establish a corporation for the *transaction of any lawful business,* or to promote or conduct any legitimate objects or purposes under the provisions of and subject to the requirements of this chapter, . . ."

Delaware Code Annotated, Title 8, Section 101. (Emphasis supplied).

As stated in *Fletcher, supra,* Vol. 6, 1968 revised vol., Chapter 58, page 335:

"§ 2491. Restriction of powers to acts not illegal or against public policy.

The First Amended Complaint states a claim for relief under 28 U. S. C. § 1331. The essence of this claim is that the directors entered into a plan resulting in the utilization of Bethlehem's resources, including the expenditure of its funds in connection with the 1972 United States Presidential election for the purpose of bringing about a Republican Party victory in violation of 18 U. S. C. § 610 (First

15. (Cont'd.)

"The words 'any lawful purpose' commonly found in the statutes impose a limitation upon the powers of the corporation enumerated in its articles of incorporation, however broad such powers may be, and in effect prohibit their exercise in such a way as to violate the statutes of the United States or of any state in which the corporation may do business."

A federal court, in interpreting a similar provision under New Jersey law, that "three or more persons may avail themselves of the provisions of the act and become a corporation for any lawful purpose," stated:

"This language is not merely perfunctory. It means, obviously, that, whatever powers the incorporators saw fit to assume, they must hold and exercise for the accomplishment of lawful objects. The words in question operate, therefore, as a limitation upon all the powers enumerated in the articles of association which were filed by the promoters of the Securities Company, so that, however, extensive and comprehensive these powers may seem to be, the state of New Jersey has said, 'You shall not exercise them so as to set at defiance any statute lawfully enacted by the Congress of the United States, or any statute lawfully enacted by any state wherein you see fit to exercise your powers."

United States v. Northern Securities Co., 120 F. 721, 727 (Circuit Ct. D. Minn., 3rd Div. 1903), *affirmed, Northern Securities v. United States*, 193 U. S. 197 (1903).

Delaware law provides further support for the proposition that it is beyond the scope of the grant of authority to cause the corporation to act in violation of federal law.

"§ 122. Specific powers.

"Every corporation created under the provisions of this chapter shall have power to—

* * *

"(6) Make by-laws not inconsistent with the *Constitution or laws of the United States*. . . ."

Delaware Code Annotated, Chapter 8, Section 122. (Emphasis supplied).

Amended Complaint, paragraphs 13, 14, 15, 17, 20, A72-74). Such unlawful expenditure by defendants gives rise to a cause of action under Delaware law. This cause of action arises under the laws of the United States within the meaning of 28 U. S. C. § 1331 since it is bottomed on the violation of 18 U. S. C. § 610. There is thus a ground for cognizance of this claim in federal court independent of the implication of any federal right of action.

This Court's decision in *Smith v. Kansas City Title Co.*, 255 U. S. 180 (1920) is directly on point. There, a stockholder brought a derivative action on behalf of a Missouri banking corporation to enjoin it from investing in certain United States Government instrumentalities which were alleged to be unlawfully issued in violation of the Constitution of the United States. Such an investment was alleged to be *ultra vires* under Missouri law in that the bank was prohibited from investing in bonds "not authorized to be issued by a valid law." *Smith v. Kansas City Title and Trust, supra,* at pp. 197-198.

There was no diversity of citizenship and the court found federal question jurisdiction on the basis that the averments of the bill drew directly into issue the constitutional validity of an act of Congress. The Court stated in reaching this conclusion:

> "The jurisdiction of this court is to be determined upon the principles laid down in the cases referred to. In the instant case the averments of the bill show that the directors were proceeding to make the investments in view of the act authorizing the bonds about to be purchased, maintaining that the act authorizing them was constitutional and the bonds valid and desirable investments. The objecting shareholder avers in the bill that the securities were issued under an unconstitutional law, and hence of no validity. It is, therefore, apparent

that the controversy concerns the constitutional validity of an act of Congress which is directly drawn in question. The decision depends upon the determination of this issue.

"The general allegations as to the interest of the shareholder, and his right to have an injunction to prevent the purchase of the alleged unconstitutional securities by misapplication of the funds of the corporation, give jurisdiction under the principles settled in Pollock v. Farmers' Loan & Trust Co., and Brushaber v. Union Pacific R. R. Co., supra. We are, therefore, of the opinion that the District Court had jurisdiction under the averments of the bill, and that a direct appeal to this court upon constitutional grounds is authorized." 255 U. S. at 201-202.

Section 1331 equally includes cases arising under the Constitution or the laws of the United States. Thus, here, since the state claim is dependent on whether or not the acts complained of are violative of 18 U. S. C. §610, the interpretation of this federal statute is directly in issue.

Justice Brennan analyzed the current judicial understanding of *Smith* in *Wheeldin v. Wheeler*, 373 U. S. 647, 659-60 (1963):

"The second possible theory builds from Smith v. Kansas City Title & Trust Co., 255 U. S. 180, 41 S. Ct. 243, 65 L. Ed. 57. A shareholder sued to enjoin the Trust Company, a Missouri corporation, from investing in certain federal bonds, on the ground that the Act of Congress authorizing their issuance was unconstitutional. It was claimed that under Missouri law an investment in securities the issuance of which had not been authorized by a valid law was ultra vires and enjoinable. The cause of action, thus, was state-created. Nevertheless this Court held that the action was one arising under federal law within the meaning of the predecessor section to 28 U. S. C. § 1331(a). See also Fielding v. Allen, 2 Cir. 181 F. 2d 163. It has been suggested that later decisions, e.g., Puerto Rico v. Russell & Co., 288 U. S. 476, 53 S. Ct. 447, 77 L. Ed. 903; Gully v. First Nat. Bank, 299 U. S. 109, 57 S. Ct. 96, 81 L. Ed. 90, repudiated Smith. London, 'Federal Question' Jurisdiction—A Snare and a Delusion, 57 Mich. L. Rev. 835, 853 (1959). But those decisions are clearly distinguishable as attempts to found federal jurisdiction upon 'remote federal premises, or mere federal permission . . ., or other merely possible federal defenses.' Hart and Wechsler, The Federal Courts and the Federal System (1953), 769. *Smith remains firm authority for the principle that 'where federal law has inserted itself into the texture of state law, a claim founded on the national legislation could be brought into a federal forum' even if the right of action was state-created.* Mishkin, The Federal 'Question' in the District Courts, 53 Col. L. Rev. 157, 166 (1953). Stated differently, 'in the Smith case the claim under federal law was an essential ingredient of the plaintiff's case, without which he could assert no right to relief.' Hart and Wechsler, supra, at 766. *In short, there is federal-question jurisdiction if a proposition of federal law is inherent in the plaintiff's claim.* Cf. Wechsler, Federal Jurisdiction and the Revision of the Judicial Code, 13 Law and Contemp. Prob. 216, 225 (1948)."

[Dissenting opinion, emphasis supplied]

Substantial policy considerations dictate that this action be heard in a federal forum. These are:

1. The federal law aspects of the cause are complex and novel, invoking questions of statutory construction and constitutionality. In contradistinction, the state law aspects involve, in the main, ancient and well-developed theories of corporate law and director responsibility. On balance of the competing judicial interests, a federal forum is therefore more appropriate;

2. The federal statute brought into issue arises out of Congressional concern about the purity of the federal elective processes. It is for the purpose of regulating conduct in a manner designed to maintain the integrity of these processes. Where Congress has enacted legislation expressing such national policies, it is both appropriate and consistent with the "arising under" grant of judicial power under Article III to provide a "federal judicial haven" to protect such legislation from uninformed or hostile alternative tribunals. "The Federal 'Question' in the District Courts", 53 Col. L. Rev. 157, 195, 196 (1953). On this point, Professor Mishkin states at 196:

> "The use of the federal trial courts to protect a congressional program seems no less meet than their use to vindicate a specific federal right. In either area the national concern and policy are first established by congressional action. The balancing of competing values is not left to the predilections of each individual federal—rather than state—court, but is declared, at least generally, by Congress. The protective forum in such circumstances is then, principally, a shield for federal legislation. In a very real sense do all such cases 'arise *under*' the laws establishing the congressional plan, within the meaning of Article III." [emphasis in original].

This concept of "arising under" is consistent with the decision in *Oneida Indian Nation v. County of Oneida,* 414 U. S. 661 (1973). That case was recognized as not involving a "garden-variety ejectment claim" on the basis that the "Federal Government has shown a continuing solicitude for the rights of the Indians in their land." Justice Rehnquist concurring at 684. In *Oneida,* the recognition of this fundamental governmental policy underlying the claim asserted led to the conclusion that a claim for relief under Section 1331 had been stated. Underlying the claim at bar is legislation expressing the government's longstanding concern about the utilization of corporate and union resources in connection with federal elections. We submit that the same considerations that led to the decision in *Oneida* compel a similar conclusion here.

Respondent's statement of claim fairly sets forth the factual framework supporting the state law basis for relief in accordance with the requisites of Rule 8 F. R. Civ. P. Consistent with the principles of modern federal pleading, courts may take judicial notice of theories of law not specifically pleaded that support a cause of action under the claim alleged. *United States v. Provident National Bank,* 259 F. Supp. 373 (E. D. Pa. 1966) and authorities cited therein. This fundamental principle was recognized under stricter prior pleading practices even in instances where an incorrect legal theory to support the claim was pleaded. *Missouri K. & T. R. Co. v. Wulf,* 226 U. S. 570 (1913). Moreover the First Amended Complaint [A72, para. 14] clearly sets forth reliance on state as well as federal law, as noted by the Third Circuit. 496 F. 2d at 419 (note 1) [A95].

Accordingly, since plaintiff's complaint states a valid cause of action pursuant to Delaware law and this cause of action can be heard by the federal courts, the District Court's grant of summary judgment was clearly erroneous and the resultant reversal by the Court of Appeals eminently correct.

III. 18 U. S. C. § 610 as Sought to Be Enforced Is Not Violative of the United States Constitution.

A. It Is Inappropriate for the Court to Reach This Constitutional Issue on a Barren Record.

In a closely similar situation to that at bar, *United States v. International Union United Automobile Workers,* 352 U. S. 567 (1957), the Supreme Court considered the propriety of a criminal indictment brought under 18 U. S. C. § 610, which alleged that the appellees had used union dues to sponsor commercial television broadcasts designed to influence the electorate to elect certain candidates for Congress in connection with the 1954 election. The appellee raised in defense the argument that the statute as applied was violative of First Amendment rights under the United States Constitution.

The Court, in upholding the indictment, remanded the case for trial, refusing to decide whether the statute as applied to the activities in question was unconstitutional without the benefit of a full trial record. The Court stated on this point:

> ". . . only an adjudication on the merits can provide the concrete factual setting that sharpens the deliberative processes especially demanded for constitutional decision." 352 U. S. at 591.

It would similarly be inappropriate to reach a constitutional determination on the meager record in this case.

This position was taken by the Court of Appeals in the case at bar. 496 F. 2d at 425-26 [A108]. The court held that § 610 applies only to partisan communications, and therefore the constitutional issue was not ripe for decision until the factual issue of whether the communications at issue were partisan, and therefore in violation of § 610, was decided. The Court recognized that:

> ". . . the district court has never passed on these contentions and that they may be reasserted on remand." 496 F. 2d at 426. [A108]

Until it is determined whether the Bethlehem directors violated § 610 this court should not decide if § 610 is unconstitutional. No constitutional decision should be reached unless the issue is unavoidable. *Ashwander v. Tennessee Valley Authority,* 297 U. S. 288, 347 (1936); *Wilshine Oil Co. v. United States,* 295 U. S. 100 (1935); *Light v. United States,* 220 U. S. 523, 538 (1911); *Siler v. Louisville & Nashville R. Co.,* 213 U. S. 175, 191 (1909); *Burton v. United States,* 196 U. S. 283, 295 (1905).

B. Corporations, as Fictional Legal Entities, Have Been Denied Other Constitutional Privileges Which Natural Persons Enjoy. Therefore, There Is No Reason to Assume That Corporations Are Fully Protected by the First Amendment.

Corporations have not been granted constitutional rights and guarantees to the same extent as natural persons. For example, although corporations have been conceded the right to equal protection of the laws, *Connecticut General Life Ins. Co. v. Johnson,* 303 U. S. 77 (1938); *Louis K. Liggett Co. v. Lee,* 288 U. S. 517 (1933), they are denied the privileges and immunities of citizens of the United States. *Hague v. Congress of Industrial Organizations,* 307 U. S.

496 (1939); *Orient Insurance Company v. Daggs,* 172 U. S. 557 (1899). Corporations also have been denied the Fifth Amendment privilege against self-incrimination. *Oklahoma Press Pub. Co. v. Walling,* 327 U. S. 186 (1946); *Essgee Co. of China v. United States,* 262 U. S. 151 (1923); *Hale v. Henkel,* 201 U. S. 43 (1906).

The Bethlehem directors contend, however, that the language of the First Amendment must be read to prohibit the regulation by Congress of corporate campaign contributions. Fortunately, this overly simplistic view of the First Amendment has never been adopted by this Court. Indeed, this Court has expressly rejected the proposition that the First Amendment is an absolute and inflexible protection of all speech, regardless of source, and has never held that corporations *per se* have First Amendment rights.

In *Wilson v. United States,* 221 U. S. 361 (1911), this Court noted that the status of a corporation is a privilege granted by the State and entered into voluntarily by individuals "whose association has the advantage of corporate organization." *Id.* at 382. The privileges granted pursuant to corporate organization "raise a distinction" between individuals and corporations so as to justify precluding the corporation from certain constitutional rights. Thus the Court denied the corporation the privilege against self-incrimination.

The above principle was further defined in *United States v. White,* 322 U. S. 694 (1944), in which the Court held:

> "The reason underlying the restriction of this constitutional privilege to natural individuals acting in their own private capacity is clear. The scope and nature of the economic activities of incorporated and unincorporated organizations and their representatives demand that the constitutional power of the federal and state governments to regulate those activities be correspondingly effective. . . . The framers of the constitutional guarantee against compulsory self-disclosure, who were interested primarily in protecting individual and civil liberties, cannot be said to have intended the privilege to be available to protect economic or other interests of such organizations so as to nullify appropriate governmental regulations." 322 U. S. at 700.

The Court in *White* stressed that a corporation represents interests which go beyond the personal interests of its members and that a corporation embodies a unique group interest. The Court held that the constitutional privilege against self-incrimination is an individual civil liberty and could not be claimed by a corporation to protect its corporate interests.

Modern corporations such as Bethlehem, because they represent massive conglomerations of wealth, could dilute or destroy the constitutional rights of ordinary citizens if allowed to contribute to political campaigns without regulation. Moreover, the purely corporate ends served when corporations contribute to political campaigns may trample on the constitutional rights of the very individuals who are stockholders of that corporation. See the concurring opinion of Justice Douglas in *International Association of Machinists v. Street,* 367 U. S. 740 (1961). Those who framed the constitution could not have intended that the First Amendment guarantees of freedom of speech should be manipulated by enormous and powerful corporations to serve purely corporate purposes, even at the expense of the rights of individual citizens.

The above approach was taken in the first case to ever rule directly on the constitutionality of the statute in ques-

tion. In *United States v. United States Brewers' Assn.*, 239 Fed. 163 (W. D. Pa. 1916), ruling on the statutory predecessor to § 610, the Court found:

> "In the exercise of its prerogatives and to secure greater economy and efficiency, the government has thought best that certain artificial bodies should be created with certain fixed and definite powers, and acting within certain prescribed limitations. These artificial creatures are not citizens of the United States, and, so far as the franchise is concerned, must at all times be held subservient and subordinate to the government and the citizenship of which it is composed.
>
> • • •
>
> And when we reflect that Congress is here dealing with elections at which Representatives in Congress are being voted for; that an election is intended to be the free and untrammeled choice of the electors; that any interference with the right of the elector to make up his mind how he will vote is as much an interference with his right to vote as if prevented from depositing his ballot; that the concerted use of money is one of the many dangerous agencies in corrupting the elector and debauching the election; that any law the purpose of which is to enable a free and intelligent choice, and an untrammeled expression of that choice in the ballot box, is a regulation of the manner of holding the election—the power of Congress to prohibit corporations of the state from making money contributions in connection with any such election appears to follow as a natural and necessary consequence." 239 at 168-69.

The 1971 amendment to § 610 makes explicit the right to utilize corporate funds to communicate with stockholders for any purpose, including to solicit voluntary contributions for political action committees. The amendment expressly permits stockholders to contribute to such committees and allows the use of funds thus raised to support political candidates. However, the amendment permits and presupposes that the committees will be controlled by directors or their designees. The directors have a significant advantage over ordinary stockholders and members of the public. They may use corporate funds without limitation to seek contributions. Thus, a particular candidate could be funded by a corporate "political action committee" even though a large majority of the stockholders opposed his candidacy. Moreover the directors retain full individual rights to expend their personal funds and speak out in support of candidates as they see fit.

The 1971 amendment fully responds to the hypothetical reservations of Justice Rutledge in his concurring opinion in *United States v. Congress of Industrial Organizations*, 335 U. S. 106 (1948) (if the Act prohibited stockholder communications, it would raise constitutional doubts); and, the Bethlehem directors' reliance on this case is misplaced. As the Court noted in *Pipefitters Local Union No. 562 v. United States*, 407 U. S. 385 (1972), the purpose of the 1971 amendment was to codify judicial comments on § 610.

The directors cite cases in which the Court has held certain activities of corporations to be within the protection of the First Amendment. Significantly, these cases all involve media, which happen to exist in corporate form. *Grosjean v. American Press Co.*, 297 U. S. 233 (1936) (involving distribution of newspapers); *Joseph Burstyn, Inc. v. Wilson*, 343 U. S. 495 (1952) and *Kingsley Int'l. Pictures*

v. Regents of the University of New York, 360 U. S. 684 (1959) (involving movie censorship); *New York Times Co. v. Sullivan,* 376 U. S. 254 (1964) (a newspaper); and *Time, Inc. v. Hill,* 385 U. S. 374 (1967) (a newsmagazine). These cases do not establish First Amendment rights of corporations *per se* but merely that natural persons retain their First Amendment rights even though they publish their views under corporate auspices. The holdings of the Court did not deal with the rights of dissenting stockholders as they were not involved in the controversies. All the corporations were members of the press whose corporate form was incidental, and they came before the Court with the presumption that their *raison d'etre* was the dissemination of information and ideas. Bethlehem, by contrast, is the second largest producer of steel in the United States [A28]. The directors cannot rely on the media cases for an unbridled right to utilize stockholders' capital, contributed for the purpose of making steel, in pursuit of their personal political objectives, so long as the use is within a broad definition of speech.

For the above reasons, the Court should reject the contention that corporations *per se* have rights under the First Amendment and hold that protections accorded certain corporate activities are based on the rights of natural persons.

C. Assuming Arguendo That Bethlehem Enjoys Full Protection of the First Amendment, 18 U. S. C. § 610 Is Constitutional.

It is established beyond question that First Amendment freedoms may be limited if the government demonstrates reasons or interests which are "compelling," *NAACP v. Button,* 371 U. S. 415, 438 (1963); "substantial,"

NAACP v. Alabama, 357 U. S. 449, 464 (1958); "subordinating", *Bates v. City of Little Rock,* 361 U. S. 516, 524 (1960).

Such a reason and interest is found in Article I, Section 4 of the Constitution, granting Congress the power to regulate elections. The Court's language in *United States v. International Union United Auto Workers,* 352 U. S. 567 (1957), interpreting § 610, emphasizes the compelling nature of the sound governmental interest in protecting the democratic electoral process. The Court found that Congress had a valid interest in preventing "the corroding effect of money employed in elections by aggregated power" 352 U. S. at 582. The Court continued, "Speaking broadly, what is involved here is the integrity of our electoral process, and not less, the responsibility of the individual citizen for the successful functioning of that process. This case thus raises issues not less than basic to a democratic society." 352 U. S. at 570.

Many cases have also recognized the compelling interest of preventing corruption in the electoral process:

> "That a government whose essential character is republican, whose executive head and legislative body are both elective, whose most numerous and powerful branch of the legislature is elected by the people directly, has no power by appropriate laws to secure this election [of the President] from the influence of violence, of corruption, and of fraud, is a proposition so startling as to arrest attention and demand the gravest consideration.
>
> If this government is anything more than a mere aggregation of delegated agents of other states and governments, each of which is superior to the general government, it *must have the power to protect the election on which its existence depends from violence and corruption.*

If it has not this power it is left helpless before the two great natural and historical enemies of all republics, open violence and insidious corruption." [emphasis supplied] *"Ku-Klux Cases"*, 110 U. S. 651, 657-658 (1884) [emphasis added].

"The congressional act under review seeks to preserve the purity of presidential and vice presidential elections. . . . The President is vested with the executive power of the nation. The importance of his election and the vital character of its relationship to and effect upon the welfare and safety of the whole people cannot be too strongly stated. To say that Congress is without power to pass appropriate legislation to *safeguard such an election from the improper use of money to influence the result is to deny to the nation in a vital particular the power of self-protection.* Congress, undoubtedly, possesses that power, as it possesses every other power essential to preserve the departments and institutions of the general government from impairment or destruction, whether threatened by force or by corruption." [emphasis supplied] *Burroughs v. United States,* 290 U. S. 534, 544-545 (1934) [emphasis added].

"It cannot be doubted that these comprehensive words [of Article I of the Constitution which grant congress power to regulate the 'times, places, and manner' of holding Congressional elections] embrace authority to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns; in short, to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved." *Smiley v. Holm,* 285 U. S. 355, 366 (1932). See also *Ex parte Siebold* 100 U. S. 371, 387 (1880).

In *United Public Workers of America v. Mitchell,* 330 U. S. 75 (1947), the Court upheld 28 U. S. C. § 380(a), § 9(a) of the Hatch Act forbidding federal employees from taking an active part in political management or campaigns. The statute had been attacked on the grounds that it violated the federal employee's First Amendment freedom of expression. Yet the Court realized that First Amendment rights are not absolute and must give way to an overriding public interest:

"To declare that the present supposed evils of political activity are beyond the power of Congress to redress would leave the nation impotent to deal with what many sincere men believe is a material threat to the democratic system. Congress is not politically naive or regardless of public welfare or that of the employees. It [the Hatch Act] leaves untouched full participation by employees in political decisions at the ballot box and forbids only the partisan activity of federal personnel deemed offensive to efficiency. With that limitation only, employees may make their contributions to public affairs or protect their own interests as before the passage of the Act . . . Congress may regulate the political conduct of government employees 'within reasonable limits' even though the

> regulation trenches to some extent upon unfettered political action." 330 U. S. at 99-102.

Similarly here, 18 U. S. C. § 610 is narrowly drawn. Specific exemptions are incorporated within it including, *inter alia,* voluntary political action funds. Corporate funds may be used to communicate with stockholders for any purpose including requests for contributions to support political candidates. Any doubts as to the constitutionality of § 610 which may have been raised by the concurring opinion in *United States v. Congress of Industrial Organizations,* 335 U. S. 106 (1948) are thus resolved.

The Court has recently affirmed *Mitchell,* further buttressing the soundness of that ruling on First Amendment rights. In *U. S. Civil Service Commission v. National Assn. of Letter Carriers,* 413 U. S. 548 (1973) the Court held that:

> "Neither the right to associate nor the right to participate in political activities is absolute in any event. See, e.g. Rosario v. Rockefeller, 410 U. S. 752 (1973); Dunn v. Blumstein, 405 U. S. 330, 336 (1972); Bullock v. Carter, 405 U. S. 134, 140-141 (1972); Jenness v. Fortson, 403 U. S. 431 (1971); Williams v. Rhodes, 393 U. S. 23, 30-31 (1969). Nor are the management, financing and conduct of political campaigns wholly free from government regulation. We agree with the basic holding of Mitchell that plainly identifiable acts of political management and political campaigning on the part of federal employees may constitutionally be prohibited. Until now this has been the judgment of the lower federal courts, and we do not understand the District Court in this case to have questioned the constitutionality of a law that was specifically limited to prohibiting the conduct in which Mr. Poole in the Mitchell case admittedly engaged." 413 U. S. at 567.

As the cost of campaigning skyrockets, the danger envisioned by Congress increases proportionately. If not restricted, corporations would have the ability to dictate who holds elective offices and what their positions on legislation and enforcement of laws will be. This power is mainly due to the unique corporate ability to aggregate capital which is in part a result of privileges granted to corporations by the government.

In addition to the compelling interest in preventing corruption, Congress also has a correlative positive interest in ensuring that political viewpoints other than those advanced by corporations are not overwhelmed. The Federal Election Campaign Act of 1971 allowing corporate contributions and expenditures which are financed by voluntary donations from a separate fund does no more than regulate the *manner* in which a corporation's expression may be exercised. This type of regulation has been approved by the Court in several cases, summarized in *California v. LaRue,* 409 U. S. 109, 117 n. 4 (1972) in which the Court said:

> ". . . States may validly limit the manner in which the First Amendment freedoms are exercised by forbidding sound trucks in residential neighborhoods, Kovacs v. Cooper, 336 U. S. 77 . . . (1949) and may enforce a nondiscriminatory requirement that those who would parade on a public thoroughfare must first obtain a permit. Cox v. New Hampshire, 312 U. S. 569 (1941). Other state limitations on the 'time, manner and place' of the exercise of First Amendment rights have been sustained. See, e.g., Cameron v. Johnson,

390 U. S. 611 (1968), and Cox v. Louisiana, 379 U. S. 559 (1965)."

In *International Association of Machinists v. Street*, 367 U. S. 740 (1961), Justice Douglas, in his concurring opinion, made the pertinent observation that the application of union funds to political purposes may violate the First Amendment rights of the members of the union in that they are in effect being forced to support financially ideas with which they may disagree. The same reasoning is applicable to stockholders in a corporation. The cases cited above would also support the right and responsibility of Congress to ensure that the voices of individual citizens are not drowned out by money-amplified corporate expression.

The Court has implied in *Pipefitters Local Union No. 562 v. United States*, 407 U. S. 385 (1971), that Congress has achieved the proper balance required in order to prevent corruption of the electoral process and to protect the First Amendment rights of individuals. Referring to Congressman Hansen's statement of the purpose of the 1971 amendment to § 610, the Court stated:

> "At the present time [Hansen summarized] there is broad agreement as to the essence of the proper balance in regulating corporate and union political activity required by sound policy and the Constitution. It consists of a strong prohibition on the use of corporate and union treasury funds to reach the general public in support of, or opposition to, Federal candidates and a limited permission to corporations and unions, allowing them to communicate freely with members and stockholders on any subject, to attempt to convince members and stockholders to register and vote, and to make political contributions and expenditures financed by voluntary donations which have been kept in a separated segregated fund. This amendment writes that balance into clear and unequivocal statutory language." 407 U. S. at 431.

Lower federal courts are unanimous in finding § 610 constitutional. In *United States v. Pipefitters Local Union No. 562*, 434 F. 2d 1116, 1123 (8th Cir. 1970), *revs'd in part on other grounds sub nom., Pipefitters Local Union No. 562 v. United States, supra*, the Court held:

> "[Section 610] does not go beyond protecting the valid governmental interest and infringe unnecessarily on constitutional rights. Separate voluntary political associations by union members are not in any way proscribed by the statute. Therefore Section 610 is not unconstitutional under the First Amendment."

In *United States v. Boyle*, 338 F. Supp. 1028, 1032 (D. C. D. C. 1972), the Court stated:

> "The Court finds the statute is sufficiently narrow on its face and in its application so that it does not unnecessarily infringe on constitutional rights beyond those where the government has demonstrated a compelling interest in regulating."

Moreover, the Court in *Boyle* was clear in holding that § 610 was not unconstitutionally vague. 338 F. Supp. at 1034. In affirming, the Court of Appeals, in *United States v. Boyle*, 482 F. 2d 755, 763-64, held that the statute was constitutional and observed that, if a union could expend "involuntary" funds upon the vote of a majority of its members, minority interests would be endangered. The

court was persuaded by the fact that unions, like corporations, can establish voluntary political action committees which can be funded by members authorized payroll deductions. Similarly, here each interested Bethlehem stockholder could authorize the amount of his choice to be deducted from his quarterly dividend payment.

In *Schwartz v. Romnes,* 357 F. Supp. 30 (S. D. N. Y. 1973), *rev'd on other grounds,* 495 F. 2d 844 (2d Cir. 1974), the district court held that the New York legislature, in enacting a state prohibition on corporate expenditures, had sought to prevent corporate officials from devoting the assets of a corporation to political causes with which stockholders might not agree. The Court held, "These overriding governmental interests are sufficient to justify the regulation of the corporate participation in electioneering efforts."

Limitations on corporate spending have been held constitutional by at least one high state court. In *People v. Gansley,* 191 Mich. 357, 158 N. E. 195 (1916), the Supreme Court of Michigan considered a state statute prohibiting political expenditures by corporations:

> "We are dealing here with a statute relating to elections, and the exercise of the police power of the state. In Cooley on Constitutional Law (7th Ed.) 907, it is said:
>
> 'All such reasonable regulations of the constitutional right which seem to the Legislature important to the preservation of order in elections, to guard against fraud, undue influence and oppression, and to preserve the purity of the ballot box, are not only within the constitutional power of the Legislature, but are commendable and at least some of them absolutely essential.'

The court further stated:

> "The individual activities of the officers of the corporations are not prohibited. They may freely speak, write and publish their views as provided for in the last clause of Section 3 [of the Michigan statute] . . . the corporation is not embraced within the provisions of section 4, article 2, of the State Constitution. That section, in our opinion, relates to natural and not artificial persons, as does also the Fourteenth Amendment of the federal Constitution, in protecting the privileges and immunities of citizens from being abridged. Western Turf Ass'n v. Greenberg, 204 U. S. 359, 27 Sup. Ct. 384, 51 L. Ed. 520 and cases cited."

For these reasons, it is respectfully submitted that 18 U. S. C. § 610 does not violate the First Amendment to the Constitution of the United States.

D. 18 U. S. C. § 610 Is Not Violative of the Fifth Amendment.

18 U. S. C. § 610 does not create a "suspect classification" such as, for example, a racial classification. Accordingly, it cannot be held to violate the due process clause unless no rational basis for the statute may be discerned. *McGowan v. Maryland,* 355 U. S. 420, 426 (1961). It is the task of Congress, not the courts, to weigh the interests to be protected and decide what regulation is reasonably designed to accomplish constitutional objectives. *Williamson v. Lee Optical of Oklahoma,* 348 U. S. 483 (1955).

The prohibition on expenditures from the general treasury of corporations to influence elections is reasonable. Corporations are granted rights by statute denied to indi-

viduals, partnerships and unincorporated associations to foster the accumulation of capital necessary for industrial enterprise. Such rights include: limited liability of the stockholders; an indefinite existence; exemption from the rule against perpetuities; favorable income tax treatment; exemptions from estate and inheritance taxes; and the right of the majority to retain capital and earnings in the corporate treasury if they can mae a minimal showing of business purpose. Corporations thereby have the ability to issue securities, and undertake projects and lines of business that would be infeasible for other entities such as partnerships or unincorporated associations. *Ballantine On Corporations,* 67 (1946), has observed that the chief source of the early opposition to the existence of corporations in America was due to the fear that the corporation, whose foremost object in incorporating "was to gain special privileges not enjoyed by other citizens . . . would infringe on the 'natural rights' of citizens."

In passing 18 U. S. C. § 610, Congress recognized that corporations, in part because of the special privileges granted them, are able to accumulate vast wealth. If left unregulated, corporations could throw the electoral process into serious unbalance. Such is the considered judgment of Congress, and that judgment may not be questioned by the judiciary. *Williamson v. Lee Optical of Oklahoma, supra.*

The provisions of § 610 recognize that the right to participate in and vote in elections was granted to natural persons but not to fictitious entities such as corporations. The provisions for use of the general corporate treasury to solicit from stockholders a political action fund is more than an adequate concession to the rights of corporations, and an effective safeguard of their interests. Moreover, the directors' asserted right to spend funds from the general corporate treasury, if granted, would unfairly discriminate

in favor of the directors and against dissenting stockholders and the public generally.

For these reasons, it is respectfully submitted that 18 U. S. C. § 610 does not violate the due process clause of the Fifth Amendment to the Constitution of the United States.

CONCLUSION.

For the reasons hereinbefore stated, Respondent Richard A. Ash respectfully requests this Court to affirm the judgment of the United States Court of Appeals for the Third Circuit.

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